

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUNSET NURSING HOME, INC.	:	DETERMINATION
for Redetermination of Mortgage Recording Tax	:	
under Article 11 of the Tax Law with Reference	:	
to a Mortgage Recorded on August 26, 1986.	:	

Petitioner, Sunset Nursing Home, Inc., Academy Street, Booneville, New York, filed a petition for redetermination of mortgage recording tax under Article 11 of the Tax Law with reference to a mortgage recorded on August 26, 1986 (File No. 804070).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 207 Genesee Street, Utica, New York, on October 20, 1988 at 2:45 P.M. Petitioner appeared by Daniel S. Cohen, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

ISSUE

Whether a mortgage made by petitioner on August 25, 1986 and recorded on August 26, 1986 was properly subject to mortgage recording tax under Tax Law § 253.

FINDINGS OF FACT

1. Petitioner, Sunset Nursing Home, Inc., is a New York corporation having its principal office and place of business at Academy Street, Booneville, New York. Petitioner, as mortgagor, made, executed and delivered its note (the "Original Note") dated October 4, 1984 and its mortgage (the "Original Mortgage") dated October 4, 1984 to Continental Securities Corporation ("Mortgagee"). The Original Mortgage was recorded October 5, 1984 in the Oneida County Clerk's Office in Liber 1662 of Mortgages at Page 245. The Original Mortgage was given to secure the Original Note which evidenced a loan of \$3,058,200.00 to be made pursuant to a building loan agreement between petitioner and the Mortgagee also dated October 4, 1984. The Original Mortgage covered premises ("the Original Mortgaged Premises") owned by petitioner in Booneville, Oneida County, New York and more particularly described in the Original Mortgage. The interest rate under the Original Note was 14.45 percent.

2. Subsequent to the execution and delivery of the Original Note and the Original Mortgage, and subsequent to the recording of the Original Mortgage, petitioner, as mortgagor, and the Mortgagee executed an agreement (the "Modification Agreement") dated March 31, 1986, modifying the Original Note and the Original Mortgage by reducing the amount of the Original Note from \$3,058,200.00 to \$3,049,100.00, and including in the Mortgaged Premises an additional small parcel of land owned by the Mortgagor. On the same date as the Modification Agreement was made, the entire principal amount of the Original Note, as modified by the Modification Agreement, was fully advanced and became fully secured by the Original

Mortgage, as modified by the Modification Agreement. Since said amount was loaned and became secured, no reloans or readvances were made and no additional amounts have or will become secured under the Original Mortgage, as so modified.

3. Petitioner subsequently was able to obtain a reduction from 14.45 percent to 10.2 percent in the interest rate which the Mortgagee was charging on the loan evidenced by the Original Note, as modified, and secured by the Original Mortgage, as modified. However, because of arrangements which it had made, the Mortgagee insisted that instead of simply executing and recording an agreement modifying the interest rate and the monthly payments of principal and interest due and payable under the Original Note, as modified, and Original Mortgage, as modified, it would be necessary for petitioner, as Mortgagor, to execute a new note and new mortgage containing all of the same terms and conditions as the Original Note, as modified, and Original Mortgage, as modified, except for the aforesaid reduction in the interest rate and the monthly payments of principal and interest due thereunder.

4. As a result of the foregoing, petitioner made, executed and delivered another Note (the "Additional Note") and an additional Mortgage (the "Additional Mortgage"), to the Mortgagee dated August 25, 1986. The Additional Note secured by the Additional Mortgage is in the same principal amount of \$3,049,100.00 as the Original Note, as modified, and no new or further monies were or will be advanced by the Mortgagee to the Mortgagor thereunder. The mortgaged premises under the Additional Mortgage are the same as the Mortgaged Premises under the Original Mortgage, as so modified. The Additional Mortgage is, by its own terms, a "Mortgage" and makes no reference to the Original Mortgage. The only differences in the terms of the Additional Note and Additional Mortgage from the terms of the Original Note, as modified, and the Original Mortgage, as modified, are the interest rate being charged thereunder and the reduced payments of principal and interest payable thereunder.

5. Included among the provisions of both the Original Mortgage and the Additional Mortgage was the following:

"The Mortgagor covenants that it will not voluntarily create or permit to be created against the property subject to this Mortgage any lien or liens inferior or superior to the lien of this Mortgage".

6. The Additional Mortgage became a lien on the Mortgaged Premises, as modified, immediately on the execution and delivery of the Additional Mortgage by the Mortgagor to the Mortgagee which took place at the Offices of the United States Department of Housing and Urban Development in Buffalo, New York on August 25, 1986. At the time of delivery of the Additional Note and Mortgage, the Original Note, as modified, and the Original Mortgage, as so modified, including the lien thereof on the Mortgaged Premises, as modified, were still in existence and held by the Mortgagee. The Additional Mortgage was recorded in the Oneida County Clerk's Office on August 26, 1986. Upon its recording, or simultaneously therewith, a satisfaction of the Original Mortgage, as modified, was recorded in the Oneida County Clerk's Office and the Original Note returned to petitioner. Then, and only then, was the lien of the Original Mortgage, as modified, extinguished. As a consequence of the foregoing, at no time was the indebtedness owed by petitioner-Mortgagor to the Mortgagee extinguished and the liens created by the Original Mortgage, as modified, and the Additional Mortgage, coexisted, however briefly.

7. At the time of recording the Additional Mortgage, Daniel S. Cohen, on behalf of

petitioner, presented an affidavit to the Oneida County Clerk requesting that the Additional Mortgage be exempted from payment of mortgage recording tax pursuant to the provisions of section 255 of the Tax Law on the ground that it was, in effect, a supplemental instrument or mortgage modifying the Original Mortgage, as modified, and not creating any new or additional indebtedness, and that the Oneida County Clerk accept the Additional Mortgage for recording without the payment of any additional or further mortgage recording tax. The Oneida County Clerk refused to do so and, as a result, petitioner paid the mortgage recording tax requested by the Oneida County Clerk in the amount of \$22,869.75, under protest, which protest was noted on the check given for such payment to the Oneida County Clerk.

8. Petitioner subsequently made application to the Division of Taxation for a refund of the mortgage recording tax in the amount of \$22,869.75. By letter from the Division of Taxation dated September 23, 1986, the refund application was denied.

CONCLUSIONS OF LAW

A. Section 253(1) of the Tax Law imposes a tax, computed by the amount of "principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state" which is recorded on or after certain dates (not relevant herein). The tax under section 253 is imposed upon the privilege of recording a mortgage; the underlying debt is the basis for computation (*Matter of S. S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635, 640, cert denied 361 US 912).

B. Section 255(1) of the Tax Law provides for the exemption from the mortgage recording tax imposed under Tax Law § 253 for "supplemental mortgages" which are defined in section 255(1) as mortgages executed and recorded: (1) to correct or perfect a prior recorded mortgage, (2) pursuant to some provision or covenant in the prior recorded mortgage, or (3) to impose an additional mortgage on property other than that covered by the prior recorded mortgage as additional security for the original indebtedness secured by the prior recorded mortgage.

C. Notwithstanding the provisions of Tax Law § 255(1), "a mortgage agreement does not have to come within the technical terms of that section in order to be exempted from the tax" (*Matter of Fifth Avenue & 46th Street Corp. v. Bragalini*, 4 AD2d 387, 391). "The essential point is that, in order to be exempt from the mortgage tax, the original indebtedness must remain undischarged and the original mortgage lien must be continued in force." (*Id.* at 393.)

D. The instrument in question, the Additional Mortgage, was, by its own terms, a mortgage. Neither the Additional Mortgage nor the Additional Note made any reference to the Original Mortgage or Original Note and neither contained any language to provide for the continuation of the original indebtedness or the original lien. In fact, the express language of both mortgages indicates that the liens created thereby were to be exclusive (Finding of Fact "5"). By extinguishing the original lien by satisfaction of the Original Mortgage, the parties preserved this exclusivity. The inclusion of language continuing the original indebtedness or lien would seem to point toward exemption from recording tax (see , e.g., *Matter of Bay View Tower Apartments, Inc. v. State Tax Commn.*, 48 AD2d 86, affd 40 NY2d 856; *Matter of Fifth Avenue & 46th Street Corp. v. Bragalini*, supra). Petitioner, however, did not provide for the continuation of the lien created by the Original Mortgage, and thus did not structure the transaction herein in such a manner as would provide for exemption from tax. Pursuant to the terms of the transaction in question, as structured by the parties thereto, the lien created by the Original Mortgage was satisfied at the time the Additional Mortgage was recorded

in its place. The first lien was thus destroyed and a new lien was created in its place (see, Matter of Fifth Avenue & 46th Street Corp. v. Bragalini, supra, at 393). "There [was thus] a new transaction with a new tax" (United States Title Guaranty Co. v. State Tax Commn., 230 NY 102; see also, Sverdlow v. Bates, 283 App Div 487; Westbrook-Buffalo, Inc. v. State Tax Commn., 257 App Div 705, affd 283 NY 552). Accordingly, mortgage recording tax was properly payable under the circumstances presented herein "merely because of the fact that the old mortgage [was] discharged and [a] new mortgage given" (Sverdlow v. Bates, supra, at 490).

E. Petitioner contends that the Additional Mortgage was a modification or supplement to the Original Mortgage. In support, petitioner notes that the Additional Note and Additional Mortgage contained all of the same terms and conditions as the Original Note and Original Mortgage (as modified). Petitioner also notes that no monies were (or will be) advanced under the Additional Note. Such facts are noted, but they do not result in exemption herein. In Sverdlow v. Bates (supra), two persons executed mortgages on seven parcels of land to a bank. Over time, the two borrowed additional monies and gave the bank additional mortgages on certain of the parcels. Eventually, there were eighteen mortgages on the seven parcels. The bank and the mortgagors then agreed on a reallocation of the amount of mortgage indebtedness as to each parcel. The bank discharged of record all of the existing mortgages, and the mortgagors executed and recorded seven new mortgages. As in the instant matter, no new monies were advanced and the total amount of the new mortgages was identical with the total amount of the discharged mortgages. Additionally, all of the new mortgages and most of the discharged mortgages included both individuals as mortgagors. Nonetheless, the court determined that all of the new mortgages were subject to mortgage recording tax "merely because of the fact that the old mortgages had been discharged and new mortgages had been given" (Sverdlow v. Bates, supra, at 490).

The fact that the same result could have been achieved by a different method without incurring recording tax liability, as is the case herein, was noted by the court in Sverdlow. The court responded by noting that "much of the law of taxation, as of real property, depends upon form" (id. at 491), and concluded that if the taxpayer chose a taxable rather than a nontaxable form, he must bear the consequences. (see also, Matter of Fifth Avenue & 46th Street Corp. v. Bragalini, supra, at 391).

The instant matter presents much the same problem. As noted previously, petitioner could have structured the transaction in such a manner as would have avoided taxation (Conclusion of Law "D"). For example, a modification agreement adjusting the interest rate and the monthly payments under the note would not have resulted in a recording tax liability (see e.g., Matter of Park & 46th Street Corp. v. State Tax Commn., 295 NY 173). Petitioner, however, chose not to structure its transaction in a nontaxable form and, pursuant to the rationale of Sverdlow v. Bates (supra), must bear the consequences.

F. Petitioner also contends that the brief coexistence of the two mortgages preserved, at all times, the Mortgagee's lien and that therefore the Additional Mortgage must be considered a supplemental mortgage within the meaning of Tax Law § 255. In support, petitioner cites Matter of Citibank, N.A. v. State Tax Commn. (98 AD2d 929). In that case, the mortgagors desired to sell their mortgaged property. They reached an agreement with the mortgagee whereby the mortgagee would release its mortgage lien on the original mortgaged property and the mortgagors would give the mortgagee a lien on their new property. A satisfaction of mortgage was recorded on May 8, 1978. The mortgagors subsequently purchased new property and on December 22, 1978 executed a new mortgage in favor of the mortgagees which was

recorded on January 19, 1979. The court held that the January 19, 1979 mortgage was subject to mortgage recording tax since the original mortgage had been discharged before the additional mortgage had been executed and recorded. The court found that the language of section 255 required that the original mortgage be in existence at the time of recordation of the subsequent one (id. at 931). Petitioner contended that since the Original Mortgage herein was in existence (however briefly) at the time of recordation of the Additional Mortgage, the recording of the Additional Mortgage should be exempt from tax.

Petitioner's contention is correct, but it does not follow from that point that the existence of the prior recorded mortgage at the time of recordation of the Additional Mortgage will necessarily result in a recording tax exemption for the Additional Mortgage. The requirement that the two instruments coexist is but a threshold requirement. Having met that requirement, the transaction must be structured in such a manner as will avoid the recording tax. In Citibank, there was an eight-month gap between the satisfaction of the first mortgage and the recording of the additional mortgage. The failure by the petitioner in Citibank to meet this threshold requirement of coexistence was dispositive of the recording tax issue in the court's view, and no further analysis of the form of the transaction in question was necessary. In discussing cases cited by the petitioner in Citibank, the court noted:

"It is sufficient that in our reading of each, the originally recorded mortgage had remained in existence at the time of the recordation of the subsequent lien instrument. That requirement having been met, the issue in each case turned on whether the second recorded instrument represented anything more than a change in form, i.e., a consolidation of previously recorded liens or an apportionment of a previously recorded mortgage lien among component parts of the mortgaged property (see ___ Matter of Suffolk County Fed. Sav. & Loan Assn. v. Bragalini, 5 NY2d 579; Matter of Bay View Towers Apts. v. State Tax Comm., 48 AD2d 86, affd 40 NY2d 856; Matter of City of New York v. Procaccino, 46 AD2d 594), or whether and to what extent the two successive mortgages secured the same original indebtedness (see ___ Matter of Woodmere Knolls v. Procaccino, 52 AD2d 979; Matter of Fifth Ave. & 46th St. Corp. v. Bragalini, 4 AD2d 387)."
(Citibank, N.A. v. State Tax Comm., supra, at 931.)

In the instant matter, while petitioner may have met the initial requirement of coexistence of the instruments at issue, it did not structure the transaction in question in such a form as would avoid the recording tax (Conclusion of Law "E"). The Citibank case is thus unsupportive of petitioner's position.

G. The petition of Sunset Nursing Home, Inc. is denied and the Division of Taxation's denial of refund is sustained.

DATED: Albany, New York
March 30, 1989

/s/ Timothy J.

Alston _____

ADMINISTRATIVE LAW JUDGE